IN THE

Supreme Court of the United States

October Term, 1958

No. 471

ANTHONY M. PALERMO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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Opinion Below

The opinion of the Court of Appeals (R. 425-430) is reported at 258 F. 2d 397.

Jurisdiction

The judgment of the Court of Appeals was entered on August 18, 1958 (R. 430), and a petition for rehearing was denied on September 25, 1958 (R. 438). The petition for a writ of certiorari was filed on October 24, 1958 and was granted on December 8, 1958 (R. 440). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Constitutional Provision and Statute Involved

Amendment V to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Section 3500, Title 18, United States Code provides:

> "§ 3500. DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES.
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified in direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85—269, Sept. 2, 1957, 71 Stat. 595."

Questions Presented

The questions presented are:

1. Whether Section 3500 of Title 18, U. S. C., authorizes a defendant in a criminal case to inspect those portions of a memorandum made by a government agent in which the government agent sets forth the substance of certain oral statements made to the government agent by a witness, where the following facts appear:

(a) The witness was called by the government and gave important testimony against the defendant;

(b) The witness had been questioned by the government agent on exactly the same subject matters on a prior occasion;

(c) The agent had made, within a few hours after this conference with the witness, a detailed memorandum in which, without direct quotation, he set forth the substance of what the witness said to him on the subject matters in question; and

(d) The defendant, having the witness under cross-examination, moved for an order directing the government to permit defense counsel to inspect those portions of the memorandum in which the agent had recorded the substance of what the witness had said as to the same subject matters.

2. Whether, if it be held that Section 3500 of Title 18, U. S. C., does not authorize inspection under the circum-

stances described above, Section 3500 is exclusive and prohibitory so as to require the trial court to deny an appropriate, timely motion to inspect.

3. Whether, if it be held that Section 3500 of Title 18 U. S. C. is not exclusive and prohibitory, a motion to inspect, made under the circumstances described above, should be granted on the authority of the decision of this Court in *Jencks* v. *United States*, 353 U. S. 657, or because required by the fair and proper administration of justice in the federal courts, or both.

4. Whether, if it be held (a) that said Section 3500 does not authorize the granting of the defendant's motion to inspect under the circumstances described above, and (b) that said Section 3500 actually prohibits the granting of such motion, said Section 3500, as so construed and applied, constitutes a deprivation of the petitioner's right to due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

Statement

Petitioner was convicted on three counts of wilful attempt to evade and defeat federal income taxes under Section 145(b) of the Internal Revenue Code of 1939, 26 U. S. C., Section 145(b), covering the years 1950, 1951 and 1952. He was sentenced to two years' imprisonment, and directed to pay costs in the amount of $2,729.20.

The issues raised on this appeal arose under the following circumstances:

Petitioner was on trial for criminal tax evasion. The government's case was based upon omissions of income from dividends and capital gains, none of which were in dispute. The sole issue to be determined by the jury was

whether the omissions resulted from a willful plan and scheme of tax evasion.

It was undisputed that petitioner's returns were not prepared by him in whole or in part. As team doctor for one of the major league baseball teams, petitioner was required each year to be away from home during the annual Spring training trip of the team. He regularly left New York in February and did not return until April. (R. 324-329.)

The evidence was clear that the returns were signed in blank by the petitioner each year prior to leaving for Spring training. (R. 10, 40, 189, 193-194, 318-319; Exs. S, YY, CCC, C-4, N-5.)

Admittedly the returns were prepared and filed by a firm of certified public accountants. The preponderance of the evidence was that the work on the returns was actually done after petitioner had left for the Spring training trip.

It appeared that the accounting firm had been preparing petitioner's returns for upwards of twenty-five years and that the procedure followed with respect to the years which were the subject matter of the indictment was not in any material respect different from the procedure followed in other years.

The senior partner of the accounting firm was one Arthur R. Sanfilippo, who was the petitioner's brother-in-law.

Neither in the indictment nor upon the trial did the government contend that there was a conspiracy between the petitioner and the accountants. On the contrary, the government's case depended upon the proposition that petitioner's tax evasion "scheme" was deliberately and willfully to supply false information to the accountants, either by giving the accountants information which the

petitioner knew to be false, or by willfully withholding and concealing information from them, or both. (R. 9-12.)

In broad outline, the defense was that the petitioner withheld nothing from his accountants; delivered to them all his bank statements, cancelled checks, brokerage statements and other pertinent records and documents from which proper returns could and should have been prepared; never saw the returns before or after they were filed; had no occasion to tote up his personal balance sheet nor personally to figure out his income from a tax standpoint and had neither knowledge nor notice that the returns were incorrect in any respect. There was a very substantial amount of evidence, consisting of oral testimony from any witnesses and significant documentary evidence, to support defendant's position. Were it not for the testimony of the accountants, or could the jury have been persuaded to reject that testimony, the defense might well have persuaded the jury that criminal intent had not been established beyond a reasonable doubt.

Sanfilippo, as the senior partner of the accounting firm, was therefore the principal and indispensable witness for the government.

On direct examination he testified, in substance, that the only function of himself and his firm was to make computations and fill out petitioner's tax returns on the basis of "figures submitted" by the petitioner. Sanfilippo denied that either he or his firm ever undertook to act as petitioner's professional tax advisors or to see to it that accurate returns were prepared. Sanfilippo even denied that any compensation was paid to him or his firm for the preparation of the returns.

In detail, Sanfilippo, together with his partner, Anthony V. Amoruso (the second most important government witness) placed upon the petitioner specific responsibility for every material omission in the returns. Wherever figures

set forth in the returns were erroneous, Sanfilippo and Amoruso swore that those specific, detailed figures were given to them orally by petitioner, principally over the telephone, and that this was done in each instance before the petitioner left New York for the Spring training trip. Where omissions from the returns were shown, the accountants testified that they had no knowledge or notice of the items omitted. The more damning aspects of their testimony were wholly without corroboration.

Much of this type of testimony could be and was shown by the defense to be completely false. This was accomplished through the oral testimony of past and present employees of the accounting firm and by documentary evidence. But it was not possible for the defense to produce distinterested or documentary contradiction of all of the testimony of Sanfilippo and Amoruso. There thus remained a large area in which the uncorroborated testimony of Sanfilippo, and to some extent Amoruso, was fatal to the petitioner if accepted by the jury.

The most important document in the case was Government Exhibit 6. It was a record kept by the petitioner himself of dividends of a certain type or class, i.e., dividends on personally held stocks as distinguished from stocks held in margin accounts with brokers. It was begun in January, 1951 and, in the form in which it was received in evidence upon the trial, had been filled out through 1952. The dividends listed on this exhibit for 1951 were so substantially in excess of the total dividends in that category reported in the 1951 return that, if the jury were satisfied that petitioner had withheld this document from the accountants, conviction was altogether likely.

The defense contention was that the exhibit, which then contained only the 1951 items, had been delivered to the accountants early in 1952, for use in preparing the 1951 return. According to the defense, failure to include these

dividend items in the 1951 return was due to carelessness or mistake on the part of the accounting firm or, what was more likely, a failure of communication between the partners in the accounting firm.* There was very substantial evidence supporting the petitioner's position as to this document. A completely disinterested witness, called by the government itself, testified that she saw and worked on Exhibit 6 in the office of the accounting firm early in 1952. There was persuasive circumstantial evidence pointing in the same direction (R. 288-293).

On direct and cross-examination Sanfilippo denied that the document had been delivered to him or his firm prior to the preparation of the 1951 return. Instead he asserted, by way of an admittedly "refreshed recollection", that it was first delivered to him at a much later date under circumstances which, if the witness was believed by the jury, were damning in the extreme (R. 27-28, 149-152).

Thus, the truth or falsity of the witness' testimony in general and in particular with respect to Government Exhibit 6 was vital to both the prosecution and the defense. If the witnesses' testimony could not be overcome by the defense, Exhibit 6 offered tremendous support for the

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* In that particular year, Sanfilippo happened to be away during tax time. In January, 1952, before leaving for California, Sanfilippo caused the accounting firm to file, on petitioner's behalf, an amended Declaration of Estimated Tax for 1951 and caused the petitioner to pay the Collector of Internal Revenue the additional sum of $4,000 on account of 1951 tax. Six weeks later, both Sanfilippo and the petitioner being away, Amoruso prepared the final return (on the form previously signed in blank by the petitioner). As filed by Amoruso, the final return ignored the dividends shown on Exhibit 6, with the result that the final return showed an over-payment of 1951 tax amounting to $4,031.63. The Amended Declaration of Estimated Tax was roughly consistent with the dividends shown on Exhibit 6; the final return, prepared and filed a few weeks later by the same accounting firm but by a different partner, was completely inconsistent with both Exhibit 6 and the amended Declaration of Estimated Tax.

Government's theory of the whole case, i.e. that petitioner's tax evasion technique was to withhold information from and thus deceive his accountants. If, on the other hand, Sanfilippo's testimony as to the time when Exhibit 6 was delivered to him should be rejected by the jury, the exhibit constituted even more powerful support for the defense theory. In such case the independent direct and circumstantial evidence indicating that Exhibit 6 had been delivered to the accounting firm early in 1952 would stand uncontradicted and, together with the exhibit itself, would strongly show (1) that the petitioner did indeed deliver to his accountants the basic records necessary for the preparation of accurate returns; (2) that the accounting firm was so negligent and inept as to ignore substantial income of which the firm actually had knowledge; and (3) that Sanfilippo's testimony on this vital point was false and obviously the result of the pressure of circumstances and determination on his part to commit perjury rather than face the professional consequences of the negligence of himself and his firm.*

Throughout the trial the defense contended:

(a) That the accounting firm was fumbling, negligent and utterly incapable of handling tax accounting of the complexity of that required in the case of the petitioner;

(b) That because the petitioner was a relative of the senior partner and substantial fees could not be charged petitioner's work was given only the sketchiest attention by the accounting firm;

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* Each return had been personally certified by either Sanfilippo or Amoruso. The accounting firm could not escape the responsibility of having prepared the returns while the petitioner was away on Spring training trips, nor of having done so on forms signed in blank. Sanfilippo and his partner held so-called "Treasury cards". If Sanfilippo, Amoruso and their firm were to escape disciplinary action by the Treasury Department and probable destruction of their professional careers, it was essential that they fasten upon the petitioner sole responsibility for each and every omission.

(c) That, as the evidence showed and in some instances the government conceded, many of the omissions from the petitioner's returns were clearly the result of inexperience, lack of professional skill, error and negligence on the part of the accounting firm; and

(d) That, being on the horns of a dilemma, Sanfilippo and his partner were lying to save their own necks.

On cross-examination of Sanfilippo, the defense brought out that the witness had been questioned on several prior occasions in the course of the investigation which led to the indictment (R. 150).

It appeared that on August 23, 1956 there was a conference between the witness and Special Agent Harper, the agent conducting the tax investigation (R. 151). The interview lasted two hours or more. There was discussed, among other things, Exhibit 6 and the time when it was first delivered by petitioner to the witness (R. 151-152). There was also discussed a material and important change in the witness' position as to Exhibit 6. The witness had previously given testimony under oath to the effect that he did not remember the exhibit at all and was unable to say when it had been received by him. Nor had he been able to recall whether or not the exhibit had been delivered to him by the petitioner prior to preparation of the 1951 return. At the conference with Special Agent Harper on August 23, 1956 the witness was shown a copy of the 1951 return and called upon to compare the figures in the return with the figures in the exhibit. He then signed an affidavit to the effect that this comparison indicated to him that the exhibit had not been delivered until after the preparation of the 1951 return (R. 151-152). Significantly, the affidavit did not state that Sanfilippo's recollection had been refreshed, or that he had any recollection at all. Thus the affidavit (a) constituted a change in his earlier testimony, and (b) was significantly different from the unequivocal,

utterly damning testimony given by him for the government on the trial.

Exactly what took place at the conference of August 23, 1956, how the affidavit came to be drawn, by whom it was drawn, why it went as far as it did, why it did not go farther and what Sanfilippo said to the agent that day thus becomes of great importance.

Although the defense has never been afforded an opportunity to inspect any portion of the memorandum, and although the government has, even if the proceedings in the Court of Appeals, been extremely (and we think unfairly) guarded in revealing the nature of the contents of the memorandum, it has conceded that the memorandum is a lengthy one; that it was made by Special Agent Harper on the same day and within "some hours after the conclusion of the conference"; that it sets forth "what transpired" at the conference between Sanfilippo and Special Agent Harper; that it refers among other things to "the kind of records and information submitted by Palermo to Sanfilippo and his firm and the occasion of these submissions," obviously including Exhibit 6 and the time when it was delivered to the witness; and that it sets forth "what transpired" between Sanfilippo and Special Agent Harper in the interview as to other material subject matters as to which the witness testified for the government upon the trial.

In the course of the cross-examination of the witness, while he was being questioned about the interview with Special Agent Harper on August 23, 1956, the defense made a timely and appropriate motion to inspect those limited portions of Harper's memorandum which set forth what the witness had said to Harper (R. 153). After extensive argument the motion was denied (R. 153-160).

The Court of Appeals affirmed. The opinion of that Court stated that Section 3500, Title 18, U. S. C., had estab-

lished the exclusive standard for production of prior statements of government witnesses and that the statements demanded were not within the statute. It stated that the memorandum was not a "substantially verbatim recital" of the witness' statements and, although it is not clear from the opinion, apparently the Court of Appeals held that the "recording" was not prepared "contemporaneously". It declined to consider whether Section 3500, Title 18, U. S. C., as construed by the trial court and the Court of Appeals, is in conflict with the decision of this Court in *Jencks* v. *United States, supra.* Not expressly but by necessary implication, the Court of Appeals declined to follow the decision of the Court of Appeals for the Sixth Circuit in *Bergman* v. *United States,* 253 F. 2d 933.

The opinion of the Court of Appeals further indicates that in considering and evaluating the decision of this Court in *Jencks* v. *United States, supra,* the Court of Appeals was greatly influenced by the assumed fact that Matusow and Ford, the government witnesses in that case, had, by the time this Court rendered its decision, been thoroughly discredited.

In the petition for rehearing (R. 431), petitioner asked that his counsel be afforded an opportunity to examine the pertinent portions of the agent's memorandum in order to be able intelligently to present the defendant's side of the case. The petition for rehearing further requested clarification of the opinion of the Court of Appeals on the point of what constituted a "substantially verbatim recital" as set forth in Section 3500, Title 18, U. S. C. It also sought clarification of the opinion of the Court of Appeals on the question of when a statement is "recorded contemporaneously" within the meaning of the same section. And finally, on petition for rehearing, the petitioner requested the Court of Appeals specifically to consider whether the decision of this Court in *Jencks* v. *United States, supra,* re-

quires that petitioner be afforded the inspection sought as a matter of simple justice and fair play, having an important bearing on the administration of justice in the federal courts. The petition for rehearing also raised the question of due process of law and the applicability of the Fifth Amendment of the Constitution of the United States, as had been done in the Court of Appeals and at the trial. Rehearing was denied without opinion on September 25, 1958 (R. 438).

SUMMARY OF ARGUMENT

In summary form petitioner's points are as follows:

1. The inspection sought by petitioner upon the trial was expressly within the grant of § 3500, Title 18, U. S. C., within the provisions, and should have been granted thereunder.

2. Section 3500, Title 18, U. S. C. was not intended to and does not prohibit inspection of the substance of an oral statement made by a government witness to a government agent relating to the same subject matters as were testified to by the witness upon the trial even though the statement be held not to have satisfied in all respects the requirements of § 3500.

3. The inspection sought below should clearly have been granted on the authority of the decision of this Court, in *Jencks* v. *United States*, 353 U. S. 657.

4. If construed and applied as to prohibit inspection under the circumstances here presented, Section 3500, Title 18, U. S. C. deprives the petitioner of due process of law and is violative of the Fifth Amendment of the Constitution of the United States.

5. By reason of the refusal of the trial court to grant inspection as sought by the petitioner under the circumstances herein, the judgments below must be reversed and a new trial granted.

POINT I

Petitioner was entitled to inspection under Section 3500, Title 18, U. S. C.

It is submitted that § 3500 clearly provides for the inspection sought by petitioner.

In the language of the statute, what Sanfilippo said at the conference was "an oral statement made by said witness"; he was a "witness called by the United States"; the statement was made " to an agent of the Government"; the memorandum of the government agent, to the extent that it set forth the substance of what Sanfilippo said, constituted an "other recording"; admittedly the statement related "to the subject matter" of the testimony of the witness on direct examination; to the extent that the memorandum contained the substance of a single statement made by the witness to the agent, the memorandum constituted a "substantially verbatim recital" of an oral statement and the statement was "recorded contemporaneously" in that, as conceded by the Government, the memorandum was prepared by the agent on the same day that the statement of the witness was made, and within a few hours thereafter.

The government contends, and the Court of Appeals in effect has held, that the statute should be narrowly construed. It is said that the statement was not "recorded contemporaneously" because it does not appear to have been recorded simultaneously. Presumably on the theory that the agent's memorandum contains other matters and does not purport to be a continuous, narrative recitation of the witness's entire statement, it is argued that the requirement of "a substantially verbatim recital" is not met.

These contentions are not convincing. In view of the decision of this Court in *Jencks* v. *United States*, 353 U. S. 657, and of the avowed intention of the Congress not "to

nullify, or to curb, or to limit'' that decision, so narrow and artificial an interpretation of the statute is unjustified.

It follows that the plain language of the statute should be respected and the petitioner's right to inspection affirmed.

POINT II

Section 3500, Title 18, U. S. C., does not prohibit the granting of inspection under the circumstances presented.

It is submitted that, even if it be held that § 3500, 18 U. S. C. does not affirmatively grant inspection to a defendant under the circumstances here existing, it certainly does not prohibit such inspection.

There is absolutely nothing in the statute itself which indicates that Congress intended to limit inspection only to documents falling within its express language. There is a prohibitive feature of the statute, but it relates merely to pre-trial proceedings (See Par. (a), § 3500), and has no application to the instant case.

Had Congress intended that the remaining sections and subdivisions of the statute should have a prohibitory effect, it could readily have inserted appropriate language to that end. It is submitted that under basic principles of statutory construction the inclusion of a mandatory prohibition in the first paragraph and the omission of any such prohibition in the remaining paragraphs requires the conclusion that the remaining paragraphs were not intended to deny to a defendant an inspection to which he would be entitled on other grounds and under other circumstances. If, it is submitted, petitioner was entitled to inspection under the decision of this Court in *Jencks* v. *United States*, then there is nothing in the statute which says that inspection must be denied.

POINT III

Inspection was required by the decision of this Court in *Jencks v. United States*, 353 U. S. 657.

Regardless of § 3500, it is submitted that petitioner's motion to inspect should have been granted on the authority of *Jencks* v. *United States*, 353 U. S. 657, *supra*.

The reasoning and underlying philosophy of *Jencks* applies to statements of government witnesses in whatever form they were made, i.e. both written and oral. Similarly it applies to any form in which the statements of government witnesses were recorded by government agents. As used in *Jencks* (353 U. S. at page 668), there is no magic in the word "recorded", nor did this Court intend thereby to place upon its decision a narrow, limited concept of what constitutes a recording.

An examination of the record in *Jencks* reveals that the Court had before it precisely the same factual situation as exists in the instant case, namely an oral statement by the witness recorded in a memorandum made by a government agent. Although the principal reference in the opinion of this Court is to written reports made by Ford and Matusow, the record in *Jencks* establishes that the witness Ford had made oral statements to the F.B.I. which were not dictated to a stenographer and were not "taken down by a shorthand reporter". All that occurred, according to Ford, was that "some notes were taken" by the F.B.I. agents.*

It thus appears that when this Court said (353 U. S. at p. 668) that the Government should have been required to produce for inspection "all reports of Matusow and Ford in its possession, written, and when orally made, as recorded by the F.B.I.", this Court was referring to the oral statements made by Ford to F.B.I. agents.

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* See pp. 164, 165, 166 and 170 of the record in this Court in *Jencks* v. *United States*.

We therefore assert that the instant case is not merely within the general rationale and doctrine of *Jencks* but is specifically covered by the decision in that case.

To illustrate the striking parallel between the two cases, we set forth below a tabular, analytical comparison between the factual situation in the instant case and that involved in *Jencks*.

Aspect or Subject Matter	*Record in Jencks*	*Record in Palermo*
Crime Charged	§ 1001, Title 18	§ 145(b), Title 26
Government Witness	Ford	Sanfilippo
Government Agents	F. B. I.	Intel. Div. I.R.S.
Type of Statement by Witness	Oral	Oral
Type of Recording or Transcription thereof	Agent's Notes or Memorandum	Agent's Memorandum; Record Silent as to possible Notes
Contemporaneously Recorded	Yes	Yes
Did Memorandum Record What Witness Said	Presumably	Yes
Timely and Appropriate Motion	None as to Oral Statements	Yes
Related to Testimony on Direct	Yes	Yes
Materiality and Importance	None Shown	Clear

As we read the decision in *Jencks*, it is not incumbent upon the petitioner, if the denial of the motion of petitioner to inspect was error, to establish that the error was prejudicial before receiving a new trial. By reason of the position taken by the government and in view of certain

decisions by the Court of Appeals for the Second Circuit,* petitioner argued the issue of prejudicial error extensively in the Court of Appeals. In view of the fact that the Court of Appeals did not even mention the point in its decision and opinion, we deem it unnecessary to labor the point again here, particularly since it seems self-evident that error on so vital an issue as the time when Government Exhibit 6 was delivered to Sanfilippo and the accounting firm could not help but be prejudicial. Should the government, however, raise the issue we shall deal with it in our reply brief.

POINT IV

If construed and applied to deprive the petitioner of the right of inspection under the circumstances here existing, Section 3500, Title 18, U. S. C. is unconstitutional and in violation of the Fifth Amendment of the Constitution of the United States.

As we have seen, the factual situation in the instant case is identical with that presented in *Jencks*. If § 3500, Title 18, U. S. C. is so construed and interpreted as to require a different result in the instant case, it is respectfully submitted that the statute is unconstitutional and void.

We earnestly submit that this is a question of simple justice and fair play. The government, under the circumstances here existing, could not in justice ask the jury to convict the petitioner on the testimony of the witness Sanfilippo, particularly Sanfilippo's testimony relating to the time when Government Exhibit 6 was delivered to the accounting firm, and at the same time deny to the petitioner access to what Sanfilippo had said to Special Agent Harper

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* *United States v. Miller*, 248 F. 2d 163 (2nd Cir., 1957), cert. den. 355 U. S. 905;

United States v. Sheba Bracelets, 248 F. 2d 134 (2nd Cir., 1957), cert. den. 355 U. S. 904.

on that same subject matter, as recorded in a memorandum in the government's possession at the time of the trial.

It is quite true that the decision in *Jencks* was not placed on constitutional grounds. A decision as to whether due process was involved was not necessary to the result in the case. But if § 3500 is construed to prohibit the inspection sought in the instant case, we submit the due process is involved, and the issue must be decided in favor of petitioner.

CONCLUSION

The decision below must be reversed and a new trial granted.

Respectfully submitted,

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